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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 368.

SUSQUEHANNA POWER COMPANY,
APPELLANT,

vs.

STATE TAX COMMISSION OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

APPELLEE'S REPLY BRIEF.

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The contentions of the appellant, as set forth in the brief filed on its behalf, are predicated upon a misconception of the basic facts, as shown by the record, and a misapplication of well-established legal principles to the facts so misconceived.

In order to clarify the issues here presented, the arguments will be briefly analyzed and discussed in the order in which they are stated in the appellant's brief.

I.

Point 1 of the appellant's brief (pp. 29-30) may be paraphrased as follows:

Lands under navigable waters, submerged pursuant to authority from the United States, are not property, and therefore, the assessment thereof to the appellant is repugnant to the Fourteenth Amendment to the Constitution of the United States.

For the purpose of this reply brief only, the navigability of the Susquehanna River at the site of the appellant's power project will be assumed, but such assumption does not afford any basis for the construction which the appellant places upon decisions of this Court cited by it in support of its contentions.

It is elementary that the State's power of taxation of land is not limited to an absolute, unqualified, fee simple interest.

In the case of *Baltimore Shipbuilding and Drydock Company v. the Mayor and City Council of Baltimore*, 195 U. S. 375, this Court said (p. 381): "• • • it needs no argument to show that the state may do less. It may tax the life estate to one and the remainder to another, and sell only the interest of the party making the default. With regard to what the State of Maryland has done, and what are the purport and attempted effect of the tax in this case, we follow the Court of Appeals. That court treated the tax and the lien as going only to the Dock Company's interest in the land."

See also:

New Brunswick v. United States, 276 U. S. 547.
Shaw v. Gibson-Zahniser Oil Co., 276 U. S. 575.

That the interest of the owner of the bed of a navigable stream is such an interest as is subject to State taxation was expressly recognized by the cases of *Central Railroad v. Jersey City*, 209 U. S. 473, and *Leary v. Jersey City*, 248 U. S. 328.

Equally elementary is it that property may be taxed at its actual utility value. This proposition was recognized and applied by this Court in the *Chandler-Dunbar Case*, 229 U. S. 53 (at p. 77), so much relied upon by the appellant.

The assessment in this case represents an application of these well-known principles. Both the State Tax Commission and the Court of Appeals fully recognized that the appellant's title to the land in question was subject to the powers and rights of the United States, treating the tax as going only to the appellant's interest in the land, and asserting merely the right to tax that interest at its actual utility value (r. 337).

The appellant seeks to avoid the application of these well-settled principles by advancing the contention that when the federal government, in the exercise of its paramount authority over the navigable waters of the United States, appropriates the flow of the stream to the purpose of navigation, no taxable interest remains in the owner of the bed of the stream. In support of that contention, the appellant relies upon the decision of this Court in the *Chandler-Dunbar Case*.

Distinguishing the decisions in the *Jersey City Cases*, the appellant, while conceding that the land constituting the bed of a navigable stream is taxable prior to the

exertion by the federal government of its paramount authority, nevertheless maintains that the power to tax disappears when the federal government has acted, without regard to the nature of the action taken. In short, the appellant contends that lands, taxable to the appellant prior to the issuance of the license under the Federal Water Power Act, are now non-taxable notwithstanding these lands are now actually used in the generation of hydro-electric power, and are thus of immense value to the owner. Supporting this paradoxical claim, the appellant relies upon the fact that the license imposes conditions looking to the hypothetical navigation of the impounded waters *in futuro*.

The appellant admits that no authority can be found for its contention, but asserts that the *Chandler-Dunbar Case* went so far as to hold that the owner of the river bed "had no right to appropriate the current to his own commercial use" (appellant's brief, p. 39), but it is clear that that case held nothing of the kind.

The court merely held that no such right existed where Congress, pursuant to its power and control over navigation, exercised its paramount authority so as to preclude the use of the river bed for private commercial purposes; and that the exercise of the paramount rights of the federal government did not constitute a "taking" of property within the meaning of the Fifth Amendment to the federal Constitution. In other words, the *Chandler-Dunbar Case* holds that the owner of the bed of navigable waters of the United States has merely a qualified property therein subject to the paramount rights in the federal government for the purpose of navigation. In such

a case, Congress has the power to destroy the right of private use altogether; and if that should be done in this case, then the submerged land would have only a nominal value.

Congress also has the right to *regulate* the private use. If we assume that in this case the obtaining of the federal license and the assumption of jurisdiction by the Federal Water Power Commission were conditions precedent to the private use of the pool, then it may be further assumed that the terms of the license and the Federal Water Power Act constitute federal regulation of the private use; but that does not mean that such federal regulation has destroyed or affected the private use. In fact, in this case, the federal license *has expressly permitted* the private use.

The most that can be said is that the license has subjected such use to limitations imposed by the act of Congress, and it cannot be assumed that the State Tax Commission did not consider the powers of Congress, *in praesenti* as well as *in futuro*, and reflect the same in the value of the lands as fixed by it for the purposes of taxation.

There is no material difference between this case and that of an interstate bridge, constructed pursuant to a license granted by the federal government, over a navigable stream, and declared to be a public highway (post road) by act of Congress, which is subject to state taxation while under private ownership, although the federal government, in the interests of navigation, has the power

to cause its removal as an obstruction to navigation without compensation to the owner.

Henderson Bridge Co. v. Ky., 166 U. S. 150;
Keokuk and H. Bridge Co. v. Ill., 175 U. S. 626;
Pa. v. Wheeling and B. Bridge Co., 18 How. 421;
Union Bridge Co. v. U. S., 204 U. S. 364;
Philadelphia v. Stimson, 223 U. S. 605;
Gibson v. United States, 166 U. S. 269.

II.

In Point 2 the appellant contends, in effect, that in so far as the bed of the Susquehanna River at the site of its power project is valuable as an aid to navigation, it is not subject to taxation by the state, notwithstanding its utility for the private purposes of the owner, because such tax would be a burden upon the federal government in the exercise of its functions.

But the so-called submerged lands, the assessment of which is here complained of, constitute the bed of an artificial pool or reservoir. The appellant's brief seems to imply that the entire bed of the pool was submerged *before* the construction of the dam, but as a matter of fact, to a large extent, the bed of the pool consists of land which has been submerged *as a result of* the construction of the dam. On the east side of the river, it includes the property formerly belonging to the Proprietors of the Susquehanna Canal, which was incorporated by Chapter 23 of the Acts of 1783 (r. 333), all that part of the Columbia Branch of the Pennsylvania Rail-

road extending from the dam up the river for a distance of fourteen miles (r. 94-95), and the entire town of Conowingo (see photographs in back of appellant's brief), together with a large amount of waste and arable lands and riparian rights (r. 94). On the western shore it includes "The Tidewater Canal Company property" (incorporated by the General Assembly of Maryland, Acts of 1825, Chapter 180), which extends from the dam for a distance of fourteen miles up the river, together with "all and singular its berme, bed, towpath, to its utmost easterly verge, improvements, structures, locks, lock houses and appurtenances thereto, basins, wharves, abutments, dams, acqueducts, water rights, privileges, easements, appurtenances and rights usable or capable of use in connection therewith" (r. 43). It also includes the former beds of state and county roads, bridges, etc. (r. 96 and photographs in the back of appellant's brief). The record also shows that, *to clear the flooded area of trees, cost the appellant $96,053.00* (r. 96-97).

It might also be supposed, from certain statements in the appellant's brief, that the flooding of the submerged lands was not essential to the development of hydroelectric power, but was imposed upon the appellant by the Federal Power Commission in the interests of navigation. Nothing could be further from the fact. The testimony of the appellant's own witnesses demonstrates that these submerged lands, which form the bed of an artificial pool, are an indispensable adjunct to the operation of the power project (r. 341), from which the appellant derives a guaranteed net return of seven per cent. on more than $45,000,000 (r. 89-274).

The appellant maintains that notwithstanding the manifest value of these submerged lands as an essential part of an enormous power plant, this value may not be taxed because the lands are used by the appellant as a federal instrumentality in the interest of navigation. In order to sustain this contention, much stress is laid upon the language of the license issued by the Federal Power Commission.

It is unnecessary to repeat here the argument made in the Brief In Support Of The Motion To Dismiss Or Affirm heretofore filed. The cases there cited show clearly that even if it be assumed that all the provisions of the Federal Water Power Act are applicable to the appellant's project, yet it is no more an instrumentality of the federal government than an interstate railroad, an interstate bridge or a carrier of the mails. The property sought to be taxed is owned, not by the government itself, but by a private agency using or operating the same for its own profit. As has been pointed out in *Clallam County v. United States*, 263 U. S. 341, 345, there is a vast distinction between property owned by the United States and operated solely for its purposes, and property owned by a private agency "interested in profit on its own account." Just as a vessel which carries coal destined for the use of the United States may be taxed to the owner thereof (*Ackerlind v. United States*, 240 U. S. 531), so may land, which supports navigable waters, be taxed to the appellant.

Moreover, the appellant in its brief utterly fails to indicate in what manner the tax here complained of imposes a burden on any function of the federal govern-

ment. A recent decision of this Court (*Willcutts v. Bunn*, 282 U. S. 216) shows that the duty of establishing the existence of such a burden rests upon the complaining taxpayer.

In this case where is any burden shown?

It is interesting to note that, by virtue of the terms of the lease between the appellant and the Philadelphia Electric Company, the taxes are borne by the consumers of electrical energy (r. 263).

III.

Appellant's Point 3 is that the utility of the lands in question for power purposes cannot be taken into consideration in assessing such lands for purposes of taxation.

In support of that contention the appellant throughout its brief has emphasized the fact that so much of the land as constituted the bed of the Susquehanna River prior to the erection of the dam was assessed at a nominal amount, and the remainder at not more than adjoining farm lands, and much complaint is made of the sudden increase in assessment.

That the value now placed upon the appellant's real property is not excessive appears from the appellant's own statement made before the Public Service Commission of Pennsylvania. At that time an expert witness for the appellant testified that the lands constituting the bed of the appellant's pool had a value of approximately $21,000,000 (r. 153). This great value is obviously due to the fact that these lands are "integrated * * * in a

single unit which can be and is utilized to produce an enormously valuable water power" (Opinion of OFFUTT, J., r. 341).

The fact that the lands heretofore might have been assessed without regard to this utility could of course furnish no ground of objection to the present assessment. Moreover, there is no reason to suppose that the taxing authorities did not exercise their best judgment in each case. As was pointed out by this court in the *Chandler-Dunbar Case*, 229 U. S. 52, at page 77, the "prospective value" of these lands for the purpose of a power site "had passed beyond the region of the purely conjectural or speculative." Their use for this purpose was not only an "immediate probability" but was an actuality.

Moreover, this court does not sit as a board of review of tax assessments, and under the authorities cited in the Brief In Support Of The Motion To Dismiss Or Affirm, heretofore filed, no federal question is involved in the absence of proof of intentional and systematic inequality.

Respectfully submitted,

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